United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL

74-2504

To be argued by
C. P. LAMBOS and
THOMAS W. GLEASON

B P/S

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

JOHN E. CUFF,

Plaintiff-Appellee,

against

THOMAS W. GLEASON, JOHN BOWERS, LESTER GARDNER, VINCENT COLUCCI, WILLIAM P. LYNCH, WILLIAM MURPHY, ANTHONY SCOTTO, WALTER L. SULLIVAN, JOSEPH VINCENZINO and FRED R. FIELD, JR., Trustees of the INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, and J. J. DICKMAN, R. F. CHIARELLO, JAMES G. COSTELLO, C. H. C. EVERHARD, DAGFINN GUNNARSHAUG, JOSEPH F. McGOLDRICK, F. X. McQUADE, MICHAEL E. MAHER, RUSSEL W. NEITZ and DONALD J. SCHMIDT, Trustees of the NEW YORK SHIPPING ASSOCIATION, INC., together constituting the joint Board of Trustees of THE NEW YORK SHIPPING ASSOCIATION-INTERNATIONAL LONGSHOREMEN'S ASSOCIATION PENSION PLAN AND NYSA-ILA PENSION TRUST FUND,

Defendants-Appellants.

BRIEF OF DEFENDANTS-APPELLANTS NYSA-ILA PENSION TRUST FUND and ITS BOARD OF TRUSTEES

THOMAS W. GLEASON
17 Battery Place, Suite 600
New York, N.Y. 10004
(212) 425-3240

LORENZ, FINN, GIARDINO & LAMBOS
25 Broadway
New York, N.Y. 10004
(212) 943-2470

Co-Counsel To Defendants-Appellants NYSA-ILA Pension Trust Fund and its Board of Trustees

Of Counsel:
C. P. LAMBOS
THOMAS W. GLEASON
RICHARD P. LERNER
RICHARD H. KAPP

249 Press of Fremont Payne, Inc., 417 Canal St., N. Y.—966—6570

1

TABLE OF CONTENTS

Cases Cited

Statute Cited

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

JOHN E. CUFF,

Plaintiff-Appellee,

against

THOMAS W. GLEASON, JOHN BOWERS, LESTER GARDNER, VINCENT COLUCCI, WILLIAM P. LYNCH, WILLIAM MURPHY, ANTHONY SCOTTO, WALTER L. SULLIVAN, JOSEPH VINCENZINO and FRED R. FIELD, JR., Trustees of the INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, and J. J. DICKMAN, R. F. CHIARELLO, JAMES G. COSTELLO, C. H. C. EVERHARD, DAGFINN GUNNARSHAUG, JOSEPH F. McGOLDRICK, F. X. McQUADE, MICHAEL E. MAHER, RUSSEL W. NEITZ and DONALD J. SCHMIDT, Trustees of the NEW YORK SHIPPING ASSOCIATION, INC., together constituting the joint Board of Trustees of THE NEW YORK SHIPPING ASSOCIATION-INTERNATIONAL LONGSHOREMEN'S ASSOCIATION PENSION PLAN AND NYSA-ILA PENSION TRUST FUND,

Defendants-Appellants.

BRIEF OF DEFENDANTS-APPELLANTS NYSA-ILA PENSION TRUST FUND and ITS BOARD OF TRUSTEES

Statement of the Issues

1. Did a labor-management Pension Board of Trustees act fraudulently, in bad faith, or arbitrarily and capriciously when it granted appellee a normal retirement pension, but denied him a disability pension, in reliance on the provisions of the Pension Plan:

A. which required the simultaneous occurrence of fifteen (15) or more years of continuous employment

and the fact of disability in order to be eligible for a disability pension;

and further provided

B. that employment terminated and was no longer considered continuous "when the employee has worked in the industry less than 400 hours a year for more than two (2) calendar years" and the appellee failed to work in the industry for more than eight years?

2. Was the Court below bound by the interpretations of the Pension Plan by the Board of Trustees, absent a showing of fraud, bad faith or arbitrary and capricious action, when the Pension Plan clearly provides "Decisions of the Board . . . in the interpretation and administration of the Plan shall be conclusive, final and binding", and where the Board of Trustees amended the Pension Plan in order to permit the appellee, and others similarly situated, to qualify for a normal retirement pension?

Proceedings Below*

Appellee:

1) by amendment to the NYSA-ILA Pension Plan (Plan) was granted eligibility for a normal retirement pension upon reaching age 62 (25a-26a, Article III Section 1.(c)(ii); 69a; 76a, ¶ 15);[1] and

2) was denied a disability pension because he had only seven (7), and not the required fifteen (15) years of continuous employment in the industry at the time he became disabled. This denial was based

---

* This action arose prior to the enactment of the Employee Retirement Income Security Act of 1974.

[1] a refers to the joint appendix preceded by the page number thereof.

on the Board of Trustees uniform interpretation and application of the Plan over a period of more than twenty (20) years (11a, ¶ 9(a); 74(a), ¶ 8; 67a; 76a, ¶ 18).

Thereafter, appellee commenced an action in the Supreme Court, State of New York, Kings County, seeking a disability pension (3a-5a). The action was removed by appellant, Board of Trustees (Trustees or Board), to the United States District Court for the Eastern District of New York.

Subsequent to removal, appellant made a Motion to Dismiss and for Summary Judgment (7a; 72a, ¶ 1) on the grounds that:

A) Appellee was not eligible to receive a disability pension under the provisions of the Plan; and

B) The Plan's Board of Trustees, pursuant to the express powers granted it by the Plan, had rendered a "conclusive, final and binding" decision denying appellee's application for a disability pension.

The motion was made upon supporting affidavits and other papers, including the Plan, and the required 9(g) Statement (8a-70a; 72a-87a).

Appellee did not file answering papers or a counter 9(g) Statement. He filed a Notice of Cross Motion for Summary Judgment and Declaratory Judgment (71a) which did not set forth the grounds upon which relief was sought and which was not supported by affidavits or any other documentary evidence.

On October 16, 1974, the Lower Court by Bruchhausen, J. found the appellant had arbitrarily and capriciously denied appellee's application for a disability pension and entered

a judgment ordering the Plan to commence paying appellee said pension retroactive to September 1, 1972 (82a-93a).

Appellant appeals that Decision, Judgment and Order as being in excess of the Lower Court's jurisdiction and scope of authority.

Facts

There is no factual dispute in this proceeding. All of the facts have been conceded by appellee and they clearly establish the following.

Appellee worked as a longshoreman in the Port of New York from 1937 to 1955 (74a, p. 9). Thereafter, he terminated his employment in the industry and a period of eight (8) full years passed before he returned to the industry in 1964 (74a-75a; ¶ 10; 75a, ¶ 13).

Under the clear, unambiguous provisions of the Plan, absence from the industry for various enumerated valid reasons excuses an employee from a break in service. Thus, if the appellee had been absent due to: (1) illness or injury off the job; (2) injury on the job; (3) military service; (4) internment or detention in a foreign country; (5) employment in the industry in a supervisory capacity; or (6) suspension or revocation of the required Waterfront Commission Registration, he would not have incurred a break in his continuous employment in the longshore industry (26a-29a, Article III, Section 2(a)(b), (c)(e)(f) and (i) respectively).

However, appellee's 8-year absence was not due to any of the above valid reasons. He voluntarily left the industry and worked elsewhere during that period (75a, ¶¶ 11-12; 81a; 83a-84a).

Under the plain provisions of the Plan, when he left, not then being qualified for a pension, he incurred a break in service, i.e., his employment in the industry was termi-

nated and was no longer considered continuous (26a; Article III, Sec. 2). It is also important to note it is undisputed that, at the time he left the industry in 1955, he was not disabled and therefore did not qualify for a disability pension.

After his absence of eight full years, appellee returned to the industry in 1964[2] and worked as a checker until 1972 (75a, ¶ 14). In May of that year he applied for a disability pension (9a-10a, ¶ 7).

The Board was troubled by the break in service of eight full years which under the plain language of Article III, Sections 1(c)(i) and 7—read as they must be with Article III, Section 2 which defines "continuous employment" in the industry—made him ineligible to receive any pension benefits (25a; 34a; 26a-30a, respectively).

In order to enable appellee and all others similarly situated who had worked in the industry a total of 25 years, but who had substantial breaks in service, to qualify for a pension, the Trustees specifically amended the Plan retroactive to January 1, 1972 to cover such individuals. This amendment provided that an applicant would be entitled to a normal retirement pension at age 62 if he had 25 years of employment, provided that he had not less than 5 years of continuous employment in the industry at the time of his application (25a-26a, Article III, Section 1(c)(ii)).

Acting on the basis of this retroactive amendment, the Trustees granted appellee a normal retirement pension payable at age 62 (69a; 76a, ¶ 15) but denied him a disability pension because of his unexcused substantial absence from the industry (26a-30a, Article III, Section 2; 74a-75a, ¶ 10-12; 83a-84a).

The Trustees determined—as they had consistently for over 20 years (76a, ¶ 18)—that in order to qualify for a

---

[2] He worked less than the required 400 hours per year in 1964 and 1965 (75a, ¶ 13).

disability pension, under the Plan's plain language (34a-35a, Article III, Section 7) there had to be a simultaneous occurrence of events. Thus, appellee had to be:

A. At least 40 years of age;

B. Disabled at the time of his application;

C. Employed in the industry at the time he became disabled; and

D. Have had 15 or more years of continuous employment at the time of his disability.

The Trustees interpreted the Plan, as was their right under its plain provisions,[3] as disqualifying appellee because of his eight years of voluntary absence from the industry (83a-84a).

The applicable provisions of the Plan which the Trustees interpreted and applied, in denying the application for a disability pension, were Article III, Section 7 (34a-35a) which provides in its pertinent part:

> "Any employee who is forty (40) years or older on or after January 1, 1950, who has been employed in the industry for a continuous period of not less than fifteen (15) years, and who during such continuous period has been employed in the industry a period of fifteen (15) consecutive years for an average of not less than 700 hours per year, and becomes permanently and totally disabled on or after January 1, 1952, being employed in the industry at the time he sustains such disability, shall be entitled to a pension.
>
> * * * *

---

[3] Article VII, Section 10 (54a) provides:

"All decisions of the Board, including those made in the interpretation and administration of the Plan, shall be conclusive, final and binding."

> Notwithstanding anything herein contained, for an employee to have been employed in the industry for a continuous period of not less than fifteen (15) years within the meaning of this Section, he must have worked in the industry not less than 400 hours a year for at least thirteen (13) years without recourse to any of the credit provisions contained in the various subdivisions of Section 2 of this Article.";

and Article III, Section 2 (the break in service provision which defines the "term of art" "continuous employment") which provides in its pertinent part (36a) that:

> "Employment in the industry shall be deemed to have terminated and shall no longer be considered continuous when the employee has worked in the industry less than 400 hours a year for more than two (2) calendar years . . ."

The Court below ignored:

> A) the fact that appellee had been granted a normal retirement pension at age 62 by virtue of the Board's action in retroactively amending the Plan's normal retirement pension provisions (25a-26a, Article III, Sec. 1(c)(ii)); and
>
> B) the "continuous employment" provisions of the Plan by reading one sub-paragraph alone—Section 7—giving no consideration, whatsoever, to Section 2 *supra,* pp. 5-7 and p. 7 respectively).

and determined that the Board's decision was arbitrary and capricious.

The Lower Court also ignored the Plan's plain provisions which expressly provides that:

> *"No employee shall have any vested right under the Plan except as may be expressly provided in the Plan* . . ." (45a, Article IV, Section 10) (Emphasis supplied)

The Plan does not provide for vesting of a right to a disability pension. It provides vesting only in two instances.

1) Where a man has attained age 60 [and, but for his not yet attaining age 62 is otherwise eligible to receive a pension] and fails to be employed in the industry until age 62 (29a, Article III, Section 2(k)); and

2) Where a man not yet age 62 has 25 years of continuous employment and was employed in the industry through October 1, 1963 and thereafter leaves the industry (29a-30a, Article III, Section 2(l)).

The Lower Court acting in derogation of the Plan's express language concerning vesting, erroneously read into the Plan a third instance of vesting of benefits.

POINT I

The Trustees' Denial Of Appellee's Application For A Disability Pension Based Upon Their Interpretation And Application Of The Plan's Provisions May Not Be Disturbed By The Court, Even Though The Court Might Reach A Different Conclusion Were It Responsible For Interpretation And Administration Of The Plan, Since That Denial Was Not The Result Of Fraud, Bad Faith And/Or Arbitrary And Capricious Action.

A. The Trustees determined that appellee was not eligible under the Plan's provisions to receive a disability pension, but did retroactively amend the Plan and grant him a normal retirement pension at age 62.

Appellee, at the time he became disabled and applied for a disability pension, had only seven (11a, ¶ 9(a); 74a, ¶ 8), not fifteen years of "continuous employment" in the industry as required by the plain language of Article III, Section 7 of the Plan (*supra*, pp. 6-7).

His prior employment in the industry, in accordance with Article III, Section 2 of the Plan, had terminated and ceased being considered continuous during the 1950's when he ". . . worked in the industry less than 400 hours a year for more than two (2) calendar years" (*supra*, p. 7). He had voluntarily terminated his prior employment—thereby creating a break in service—when he voluntarily left the industry in 1956 and proceeded to work elsewhere solely for a period of eight years, 1956 through 1964 (75a, ¶¶ 11-12; 81a; 83a-84a).

Reading Article III, Sections 2 and 7 together (*supra*, p. 7 and pp. 6-7, respectively), as must be done, and applying them to appellee's employment record, the Trustees found (as they had in all similar cases arising over a 20-year period (76a, ¶ 18)) that appellee was not eligible to receive a disability pension. To have found otherwise would have been arbitrary and capricious.

They could not find, as the Lower Court erroneously did, that appellee had vested rights in a disability pension. The plan provides:

> "No employee shall have any vested right under the Plan except as may be expressly provided in this Plan." (45a, Article IV, Section 10)

And this Plan does not provide for the vesting of rights in a disability pension.[4]

Clearly, in view of the plain language of the Plan, the Trustees had no alternative but to deny appellee's application for a disability pension.

However, appellee was not left without a pension, for the Trustees retroactively amended the Plan to provide that an employee would be entitled to a normal retirement pension at age 62 if he had 25 years of employment, provided that

---

[4] The two instances in which an individual vests in the right to receive a pension are set forth at page 8, *supra*.

he had not less than 5 years of continuous employment in the industry at the time of his application (25a-26a, Article III, Section 1(c)(ii)). Pursuant to this retroactive amendment, appellee (and others similarly situated) was granted a normal retirement pension payable at age 62 (76a, ¶ 15).

B. The Lower Court exceeded its scope of authority when it reversed the Trustees' determination that appellee's application for a disability pension should be denied.

The court's scope of review in cases such as this is extremely limited.

This Court recently held in *Joseph de Loraine* v. *MEBA Pension Trust,* 499 F. 2d 49 (1974), that in Taft-Hartley Act claims, there must be the same showing of improper motivation as is required in Age Discrimination Act claims.

And as the Court of Appeals held in *Lowenstern* v. *International Association of Machinists and Aerospace Workers AFL-CIO,* 479 F. 2d 1211 at 1213 (U.S. App. D.C. 1973):

> "Our scope of review in such cases is limited to a determination of whether the decisions by the Administrators were arbitrary and capricious in denying appellant his request. Assalone v. Carey, 154 U.S.App.D.C. 69, 473 F.2d 199 (1972); Gaydosh v. Lewis, 133 U.S. App.D.C. 274, 410 F.2d 262 (1969). In this case appellant urges an interpretation of the word 'employed' that is broader than that adopted by the Administrators. However, even assuming appellant's construction were reasonable, as between two competing interpretations of the Plan, we are bound by that of the Administrators if it is not arbitrary and capricious. Miniard v. Lewis, 128 U.S.App.D.C. 299, 387 F.2d 864 (1967), cert. denied, 393 U.S. 873, 89 S.Ct. 166, 21 L.Ed. 144 (1968); see also Roark v. Lewis, 130 U.S.App.D.C. 360, 364, 401 F.2d 425, 429 (1968)."

See also *Moglia* v. *Geoghagen*, 267 F.Supp. 641, aff'd 403 F.2d 110 (CA 2, 1968) cert. den. 394 U.S. 919 (1969), in which it was held:

> "This brings us to the statute and to the extent of the jurisdiction of this Court in the matter. We hold our jurisdiction to be limited to inquiry as to whether there has been a violation of the statute either in its letter or its spirit, and that there does not rest in the Court a general power to dictate, rephrase or interfere with the provisions of an agreement freely entered into between the Union and the Employers for the benefit of the employees, regulating coverage and eligibility, and imposing conditions on both. These are matters which the statute has entrusted to the Trustees (Rittenberry v. Lewis, D.C., 238 F. Supp. 506)" (267 F.Supp. 645).

That the Court exceeded its scope of authority when it found appellee eligible to receive a disability pension is clear from the following:

Firstly: The Plan contains two pertinent sections—Article III, Sections 2 and 7 (*supra*, p. 7 and pp. 6-7, respectively)—which must be read and applied together to determine whether one is eligible to receive a disability pension. The Court completely ignored one of the two Sections in its entirety i.e., Section 2 which defines the "term of art" "continuous employment"—one of the four eligibility prerequisites. Instead the Lower Court either read Section 7 in a vacuum or took it upon itself to define that term.

Clearly the Lower Court acted beyond its scope of authority when it ignored the plain language of the Plan by failing to read together all pertinent sections of the Plan and took it upon itself to fill a void which did not exist in the plan.

Secondly: Contrary to the language in *Moglia, supra,* the Lower Court dictated, rephrased and interfered with

the provisions of the Plan. It did so by finding that appellee had a vested right to a disability pension contrary to clear, unambiguous language of the Plan. (Article IV, Section 10, *supra*, p. 7).[5]

The Plan does not expressly provide for the vesting of rights to a disability pension. For the Lower Court to have so found is contrary to the express language of the Plan.

The Lower Court's reliance on *La Vella* v. *Boyle*, 444 F.2d 910 (U.S. App. D.C. 1971) in support of its position is greatly misplaced.

In *La Vella* the Court held that:

> ". . . a coal industry employee . . . who had accrued his 20 years service prior to the imposition of . . . [an] additional [work] requirement, and whose failure to work the additional years prior to the age date of eligibility for his pension was due to permanent disability caused by the occupational disease endemic to the mining industry, had sufficiently vested rights in 1952 which could not be cut off by the change in eligibility requirements in 1953." (444 F 2d at 912)

As the Court further pointed out in footnote 3 (p. 912), it was utilizing the term vested to describe the case of a man

---

[5] The rationale for interpreting and applying Article III, Sections 2 and 7, which must be read together with Article IV, Section 10, is clear. The Board of Trustees intended to prevent the grant of disability pension in instances where individuals were employed in the industry for fifteen (15) years; thereafter left and worked elsewhere for a substantial number of years; returned for a short period of time—even one (1) day—and filed for a disability pension ;and were found to be totally and permanently disabled.

Applying the Lower Court's decision to the instant matter, the appellee would have been entitled to a disability pension solely by returning for one (1) day in 1972 after having worked outside the industry for a period almost equal to (or, for that matter, in excess, of) his prior employment in the industry.

who, at a certain date, had met all of the requirements for a pension except age.

The *La Vella* case, *supra,* is clearly inapplicable. It bears no resemblance whatsoever to the instant matter.

Appellee has not been denied a disability pension because of a change in the Plan's employment eligibility provisions. In fact, it is by virtue of a change in the Plan's provisions that appellee will receive a normal retirement pension at age 62. Without that change, he would not have been eligible for any pension.

Nor was he denied a pension because he was unable to work in the industry due to an injury or illness suffered in the industry. In fact this Plan provides for an exception to the break in service rules in such instances.

Appellee was denied a disability pension solely on the basis of the Plan's plain language setting forth the requirements for a disability pension. Those requirements have remained intact and have been consistently interpreted and applied since the Plan's inception over 20 years ago; and he did not meet those requirements because he voluntarily chose to leave the industry and work elsewhere for in excess of eight years.

More importantly, unlike *La Vella,* he never met all of the Plan's requirements except for age. He was not totally and permanently disabled in 1955 when he had fifteen (15) continuous years of employment. It was in 1972 that he became disabled and, at that time, he had only seven (7) years of continuous employment, not fifteen (15) years as required by the Plan (11a, ¶ 9a; 74a, ¶ 18, Article III of Section 7, *supra,* pp. 6-7).

The Lower Court in finding that appellee had a vested right to a disability pension, violated the letter of the Plan, interfered with its collectively bargained provisions and destroyed the express intent of the labor-management parties to the Plan.

Thirdly: Even were we to grant the Lower Court every benefit of the doubt and assume, for the moment, that the Court chose between two competing interpretations and found appellee's to be more reasonable, to have done so was to exceed its scope of authority.

As was held in *Miniard* v. *Lewis,* 387 F. 2d 864 at 865 (U.S. App. D.C., 1967), cert. den. 393 U.S. 873 (1968):

> "While the contested phrase in the resolution may be susceptible to the interpretation which he urges, it is at least equally susceptible to the trustees' interpretation. *Consequently, he calls upon us to decide which of the two competing interpretations is more reasonable or is more likely to have been intended. This we may not do.*" (Emphasis supplied)[6]

Finally: As the Court of Appeals held in *Menke* v. *Thompson,* 140 F.2d 786 at 791 (CA8, 1944):

> "The decision of the Board of Pensions denying Menke's claim for a pension is therefore conclusive, to use the words of this court in *Guild* v. *Andrews,* 8 Cir., 137 F. 369, 371, 'in the absence of fraud or such gross mistakes as imply bad faith or a failure to exercise an honest judgment.' *The burden of showing such fraud, bad faith, or mistake was upon the appellant here, and, to sustain such a showing, the evidence 'must be more than a mere preponderance, it must be overwhelming'. Road Improvement Dist. No. 5 of Crittenden County, Ark.* v. *Roach,* supra, 18 F.2d at page 760." (Emphasis supplied).

Appellee herein has not shown overwhelming evidence of fraud, bad faitn or mistake. In fact he has not even alleged such conduct.

---

[6] See also *Lowenstern, supra,* p. 10.

The Trustees acted in a fair and reasonable manner in interpreting and applying the provisions of the Plan. The Lower Court went beyond its scope of authority, and exceeded its jurisdiction when it ignored the plain language of the Plan, including its definitions and limitations.

POINT II

Appellee As A Matter Of Law May Not Pursue This Action Since He Is Bound By The Final And Binding Determination Rendered By The Board Of Trustees Pursuant To The Provisions Of The Plan.

Article VII, Section 10 (54a) provides that:

> "All decisions of the Board, including all those made in the interpretation and administration of the Plan, shall be conclusive, final and binding."

The U.S. Supreme Court in *General Drivers, Warehousemen and Helpers, Local Union No. 89* v. *Riss & Company, Inc.*, 372 US 517 (1963) has determined that the decisions of a joint labor-management committee are final and binding when the agreement so provides, and thus are the equivalent of an arbitration award, when it held:

> ". . . *if the award at bar is the parties' chosen instrument for the definitive settlement of grievances under the Agreement,* it is enforceable under § 301. And if the joint Area Cartage Committee's award is thus enforceable, *it is of course not open to the courts to reweigh the merits of the grievance.* American Mfg. Co. supra, 363 US at 567, 568". (372 US at 519) (Emphas added)

See also: *Humphrey* v. *Moore,* 375 U.S. 335 (1964); *Warner* v. *Werner Continental, Inc.,* 466 F.2d 1185 (CA 6, 1972); *Harris, et al.* v. *Chemical Leaman Tank Lines, Inc.,*

437 F.2d 167 (CA 5, 1971); *Dill* v. *Greyhound Corporation,* 435 F.2d 231 (CA 6, 1970).

Decisions of a joint labor-management Board of Trustees of a pension plan, made pursuant to the express power granted the Trustees, are no different than those of a joint labor-management committee established pursuant to a collective bargaining agreement. They, too, are considered to be final and binding unless, arbitrary and capricious: *Lowenstern* v. *International Association of Machinists and Aerospace Workers,* 479 F. 2d 1211 (U.S. App. D.C. 1973); *Miniard* v. *Lewis,* 387 F. 2d 864 (U.S. App. D.C. 1967); cert. denied, 393 U.S. 873; *Szuch* v. *Lewis,* 193 F. Supp. 831 (D.C.C. 1960); *Kennet* v. *United Mine Workers of America,* 183 F. Supp. 315 (D.C.C. 1960); or, unless as was held in *Menke* v. *Thompson,* 148 F. 2d 786 (CA 8, 1944), it is shown by an overwhelming preponderance of the evidence to be the result of fraud or bad faith.

The final and binding decision of the Trustees in the instant matter, as established in Point I, *supra,* was not arbitrary and capricious or fraudulent or made in bad faith.

It was based upon the interpretation and application of all of the applicable provisions of the Plan. Those provisions when applied to appellee's employment record in the industry at the time he applied for a disability pension proscribed his application being approved. He did not meet the required simultaneous occurrence of events because at the time he applied for a disability pension, he did not have 15 years of continuous employment at the time he became disabled while employed in the industry.

Accordingly, the Board's final and binding determination should be affirmed.

Conclusion

The Lower Court having exceeded its scope of authority and there being no genuine issue of fact for trial, it is respectfully requested that the Lower Court's grant of Summary Judgment to appellee be reversed and that this Court enter an order granting Summary Judgment for appellants.

Respectfully submitted,

THOMAS W. GLEASON
17 Battery Place, Suite 600
New York, N. Y. 10004
(212) 425-3240

LORENZ, FINN, GIARDINO & LAMBOS
25 Broadway
New York, N. Y. 10004
(212) 943-2470

Co-Counsel to Defendants-Appellants
NYSA-ILA Pension Trust Fund
and its Board of Trustees

Of Counsel:

C. P. LAMBOS
THOMAS W. GLEASON
RICHARD P. LERNER
RICHARD H. KAPP

1/3/75 - Rec'd 2 copies

R. Ziegler